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Thirteenth report on reservations to treaties*

By Mr. Alain Pellet, Special Rapporteur**

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* Although the eleventh, twelfth and thirteenth reports constitute a single text, they have been issued as separate documents under the symbols A/CN.4/574, A/CN.4/584 and in the present document, respectively. Thus, the numbering of paragraphs and footnotes is continuous.

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II. Reactions to interpretative declarations

276. The "provisional plan of the study"[460] does not mention the issue of States' and international organizations' reactions to interpretative declarations. This is because it was not originally intended that such reactions should be considered together with reservations; not until later did the desirability of a parallel study of reservations and interpretative declarations become clear.[461]

277. The Vienna Conventions on the law of treaties make no reference to interpretative declarations — which were touched upon only briefly in the *travaux préparatoires* for those texts[462] — and thus say nothing about reactions to interpretative declarations, the forms they may take, the procedure for formulating them or their effects. Accordingly, the scarcity or uncertainty of practice in this area makes it necessary to take an approach that differs from the one adopted in considering the issue of objection to and acceptance of reservations.[463] As the Commission has already noted in its work on interpretative declarations:

> "In view of the lack of any provision on interpretative declarations in the Vienna Conventions and the scarcity or relative uncertainty of practice with regard to such declarations, they cannot be considered in isolation. We can only proceed by analogy with (or in contrast to) reservations, taking great care, of course, to distinguish conditional interpretative declarations from those that are not conditional.[464]"[465]

278. In the light of these remarks, it is important not to overlook the differences between reservations and interpretative declarations, which are not intended to produce the same legal effects on the treaty: while a "reservation", by definition, purports "to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization",[466] an interpretative declaration, according to draft guideline 1.2, "purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions".

279. The legal effects which reservations, on the one hand, and interpretative declarations, on the other, are meant to produce are thus different and do not, in fact, have the same impact on the treaty: whereas a reservation, by definition, purports to modify or to exclude completely the legal effects of either a provision of a treaty or the treaty as a whole with regard to certain aspects of its application to the reserving State or organization, an interpretative declaration does not (at least openly) purport to modify the treaty's legal effects with regard to the declarant, but merely to clarify

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[460] See the second report on reservations to treaties (A/CN.4/477), para. 37; see also the seventh report (A/CN.4/526), para. 18.

[461] See the fifth report on reservations to treaties (A/CN.4/508/Add.3), paras. 217 and 218.

[462] See the third report on reservations to treaties (A/CN.4/491/Add.1), paras. 64-68.

[463] See the twelfth report on reservations to treaties (A/CN.4/584), para. 183.

[464] On the distinction, see draft guidelines 1.2 and 1.2.1 and the commentary pertaining to them in *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), chap. VI, sect. C.2, pp. 223-249.

[465] See the general commentary on section 2.4 (Procedure for interpretative declarations), *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), chap. IV, sect. C.2, p. 115.

[466] See draft guidelines 1.1 and 1.1.1, *Yearbook ... 1998*, vol. II, part two, pp. 99 and 101.

its meaning. This essential difference[467] makes it justifiable, and indeed necessary, for the rules governing reactions to interpretative declarations to be more than a mere copy of the Vienna Conventions' rules on acceptance of and objection to reservations (see section A below).

280. This is far less evident in the case of conditional interpretative declarations, which should be clearly distinguished from "simple" interpretative declarations.[468] Under draft guideline 1.2.1, a conditional interpretative declaration is a unilateral statement "whereby [the author] subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof".[469] Thus, although a conditional interpretative declaration does not produce legal effects that differ from those of a "simple" interpretative declaration, it is characterized by the fact that its author "does not merely propose an interpretation, but makes its interpretation a condition of its consent to be bound by the treaty",[470] "so that they [conditional interpretative declarations] come closer to being a reservation".[470] However, this does not in itself mean that the regime for reactions to interpretative declarations should be identical to the one for reactions to (acceptance of and objection to) reservations. This is only a working hypothesis that should be explored (see section B below).[471]

A. Interpretative declarations (general regime)

281. Owing to the exclusion of interpretative declarations from the Vienna Conventions, articles 19 to 23 of those texts do not apply to reactions to interpretative declarations, according to the positions taken in the vast majority of cases in the literature, which stress the difference between the legal regimes applicable in this respect to reservations, on the one hand, and interpretative declarations, on the other.[472] This difference is clearly delineated in Ethiopia's "objection" to Yemen's declaration concerning the United Nations Convention on the Law of the Sea, signed in Montego Bay in 1982:

> "the declaration [of Yemen], not constituting a reservation as it is prohibited by article 309 of the Convention, is made under article 310 of same and as such is not governed by articles 19-23 of the Vienna Convention on the Law of Treaties providing for acceptance of and objections to reservations".[473]

282. Nonetheless, an interpretative declaration, like a reservation, may logically generate three types of reactions on the part of the States and international organizations concerned:

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[467] See draft guideline 1.3 (Distinction between reservations and interpretative declarations), *Yearbook ... 1999*, vol. II, part two, p. 107.

[468] See para. 277 above.

[469] *Yearbook ... 1999*, vol. II, part two, p. 103.

[470] Ibid., para. (1) of the commentary on draft guideline 1.2.1.

[471] *Yearbook ... 1999*, vol. II, part two, p. 105, para. 14 of the commentary on draft guideline 1.2.1.

[472] See, in particular, D. M. McRae, "The Legal Effect of Interpretative Declarations", *B.Y.B.I.L.*, 1978, pp. 155-173, especially p. 166; Franck Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, T.M.C. Asser Institut, 1988, p. 244; Rosario Sapienza, *Dichiarazioni interpretative unilaterale e trattati internazionali*, Milan, A. Giuffrè, 1996, p. 274.

[473] *Multilateral treaties deposited with the Secretary-General (Status as at 31 December 2006)*, document ST/LEG/SER.E/25, vol. II, p. 364 (chap. XXI.6).

- A positive reaction whereby the author expresses, either explicitly or implicitly, agreement with the unilateral interpretation proposed by the State or organization that made the interpretative declaration (see paras. 283-287 below);
- A negative reaction whereby the author expresses disagreement with the interpretation proposed by the State or organization that made the interpretative declaration, or expresses opposition to its classification as an "interpretative declaration", usually on the ground that it is in reality a reservation (see paras. 288-298 below);
- Silence; i.e., the absence of any explicit manifestation of approval or opposition (see paras. 307-316 below).

Interpretative declarations or statements that are presented as such may also elicit a fourth type of reaction that does not specifically concern the substance of the declaration, but rather its classification (see paras. 299-306 below).

1. Positive reaction — approval

283. It appears that State practice with respect to positive reactions to interpretative declarations is virtually non-existent. However, *Multilateral treaties deposited with the Secretary-General* includes a text submitted by Israel reacting positively to a declaration submitted by the Arab Republic of Egypt[474] concerning the United Nations Convention on the Law of the Sea:

> "The concerns of the Government of Israel, with regard to the law of the sea, relate principally to ensuring maximum freedom of navigation and overflight everywhere and particularly through straits used for international navigation.
>
> In this regard, the Government of Israel states that the regime of navigation and overflight, confirmed by the 1979 Treaty of Peace between Israel and Egypt, in which the Strait of Tiran and the Gulf of Aqaba are considered by the Parties to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight, is applicable to the said areas. Moreover, being fully compatible with the United Nations Convention on the Law of the Sea, the regime of the Peace Treaty will continue to prevail and to be applicable to the said areas.
>
> It is the understanding of the Government of Israel that the declaration of the Arab Republic of Egypt in this regard, upon its ratification of the [said] Convention, is consonant with the above declaration".[475]

It appears from this declaration that the interpretation put forward by Egypt is regarded by Israel as correctly reflecting the meaning of chapter III of the Montego Bay Convention. The Egyptian interpretation is, in a manner of speaking, confirmed by the reasoned "approbatory declaration" made by Israel.

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[474] "The provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general regime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general regime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait" (ibid., p. 344).

[475] Ibid., p. 364. In fact, this statement expresses approval of both the classification and the substance of the Egyptian declaration; given the formulation of these declarations, it may be wondered whether they might have been made as a result of a diplomatic agreement.

284. Another example that could be cited is the reaction of the Government of Norway to a declaration made by France concerning the 1978 Protocol relating to the 1973 International Convention for the Prevention of Pollution from Ships, published by the Secretary-General of the International Maritime Organization:

> "the Government of Norway has taken due note of the communication, which is understood to be a declaration on the part of the Government of France and not a reservation to the provisions of the Convention with the legal consequence such a formal reservation would have had, if reservations to Annex I had been admissible".[476]

It appears that this statement can be interpreted to mean that Norway accepts the French declaration insofar as it does not constitute a reservation.

285. These very rare examples show that a situation may arise in which a State or an international organization expresses agreement with a specific interpretation proposed by another State or international organization in an interpretative declaration. Such agreement between the respective interpretations of two or more parties is expressly envisaged in article 31, paragraph 3 (a), of the Vienna Conventions, which provides that, for the interpretation of a treaty,

> "There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".

286. However, it is not necessary at this stage of the study to specify the legal effect which the expression of such agreement with an interpretative declaration may produce. It suffices to note that such agreement should not be confused with the acceptance of a reservation, if only because, under article 20, paragraph 4, of the Vienna Conventions, such acceptance entails the entry into force of the treaty for the reserving State — which is evidently not the case of a positive reaction to an interpretative declaration. To underscore the differences between the two, it would be wise to use different terms. The term "approval", which expresses the idea of agreement or acquiescence without prejudging the legal effect actually produced,[477] could be used to denote a positive reaction to an interpretative declaration.

287. In view of these considerations, a draft guideline 2.9.1 worded as follows could be placed at the beginning of section 2.9 (Formulation of reactions to interpretative declarations) to define the expression "approval of an interpretative declaration":

2.9 Formulation of reactions to interpretative declarations

2.9.1 Approval of an interpretative declaration

"Approval" of an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation proposed in that declaration.

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[476] *Status of multilateral conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions (as of 31 December 2007)*, p. 108 (note 1).

[477] See Jean Salmon (ed.), *Dictionnaire de droit international public*, Brussels, Bruylant/AUF, 2001, pp. 74-75 (Approbation, 1.).

2. Negative reaction — opposition

288. Examples of negative reactions to an interpretative declaration, in other words, of a State or an international organization disagreeing with the interpretation given in an interpretative declaration, while not quite as exceptional, are nonetheless sporadic. The reaction of the United Kingdom of Great Britain and Northern Ireland to the interpretative declaration of the Syrian Arab Republic[478] in respect of article 52 of the 1969 Vienna Convention is an illustration of this:

> "The United Kingdom does not accept that the interpretation of Article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act".[479]

289. The various conventions on the law of the sea also generated negative reactions to the interpretative declarations made in connection with them. Upon ratification of the Convention on the Continental Shelf, concluded in Geneva in 1958, Canada declared "[... t]hat it does not find acceptable the declaration made by the Federal Republic of Germany with respect to article 5, paragraph 1".[480]

The United Nations Convention on the Law of the Sea, by virtue of its articles 309 and 310, which prohibit reservations but authorize interpretative declarations, gave rise to a considerable number of "interpretative declarations", which also prompted an onslaught of negative reactions by other contracting States. Tunisia, in its communication of 22 February 1994, made it known, for example, that:

> "[...] in that declaration [of Malta], articles 74 and 83 of the Convention are interpreted to mean that, in the absence of any agreement on delimitation of the exclusive economic zone, the continental shelf or other maritime zones, the search for an equitable solution assumes that the boundary is the median line, in other words, a line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters is measured.
>
> "The Tunisian Government believes that such an interpretation is not in the least consistent with the spirit and letter of the provisions of these articles, which do not provide for automatic application of the median line with regard to delimitation of the exclusive economic zone or the continental shelf".[481]

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[478] This declaration reads as follows: "D — The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows:

> The expression 'the threat or use of force' used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests" (*Multilateral treaties* ..., note 473 above, vol. II, p. 412 (note 146) (chap. XXIII.1).

[479] Ibid., p. 416.

[480] Ibid., p. 329 (chap. XXI.4). The German interpretative declaration reads as follows: "The Federal Republic of Germany declares with reference to article 5, paragraph 1, of the Convention on the Continental Shelf that in the opinion of the Federal Government, article 5, paragraph 1, guarantees the exercise of fishing rights (*Fischerei*) in the waters above the continental shelf in the manner hitherto generally in practice" (ibid., p. 328).

[481] Ibid., p. 372 (note 16). The relevant part of the Maltese declaration reads as follows:

> "The Government of Malta interprets article 74 and article 83 to the effect that in the absence of agreement on the delimitation of the exclusive economic zone or the continental shelf or other maritime zones, for an equitable solution to be achieved, the boundary shall be the median line, namely a line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial waters of Malta and of such other States is measured" (ibid., p. 352).

Another very clear-cut example can be found in the statement of Italy regarding the interpretative declaration of India in respect of the Montego Bay Convention:

> "Italy wishes to reiterate the declaration it made upon signature and confirmed upon ratification according to which 'the rights of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them'. According to the declaration made by Italy upon ratification, this declaration applies as a reply to all past and future declarations by other States concerning the matters covered by it".[482]

290. Examples can also be found in the practice of States members of the Council of Europe. Thus, the Russian Federation, referring to numerous declarations by other States parties in respect of the 1995 Framework Convention for the Protection of National Minorities, in which they specified the meaning to be ascribed to the term "national minority", declared that it:

> "[...] considers that none is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework Convention for the Protection of National Minorities, a definition of the term 'national minority', which is not contained in the Framework Convention. In the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States parties to the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the Protection of National Minorities".[483]

291. Furthermore, the example of the statement of Italy regarding the interpretative declaration of India shows that, in practice, States that react negatively to an interpretative declaration formulated by another State or another international organization often propose in the same breath another interpretation that they believe is "more accurate". This practice of "constructive" refusal was also followed by Italy in its statement in reaction to the interpretative declarations of several other States parties to the March 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal:

> "The Government of Italy, in expressing its objection vis-à-vis the declarations made, upon signature, by the Governments of Colombia, Ecuador, Mexico, Uruguay and Venezuela, as well as other declarations of similar tenor that might be made in the future, considers that no provision of this Convention should be interpreted as restricting navigational rights recognized by international law. Consequently, a State party is not obliged to notify any other State or obtain authorization from it for simple passage through the territorial sea or the exercise of freedom of navigation in the exclusive economic zone by a vessel showing its flag and carrying a cargo of hazardous wastes".[484]

Other States which had made an interpretative declaration comparable to that of Italy did not feel it was necessary to react in the same way that the Italian Government had, but merely remained silent.[485]

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[482] Ibid., p. 364.

[483] *European Treaty Series*, No. 157 (http://conventions.coe.int).

[484] *Multilateral treaties* ..., note 473 above, p. 522 (chap. XXVII.3).

[485] On the question of "silence", see paras. 307-316 below.

292. The practice also evoked reactions that, prima facie, were not outright rejections. In some cases, States seemed to accept the proposed interpretation on the condition that it was consistent with a supplementary interpretation. The conditions set by Germany, Poland and Turkey for consenting to Poland's interpretative declaration in respect of the European Convention on Extradition of 13 December 1957[486] are a good example of this. Hence, Germany considered:

> "the placing of persons granted asylum in Poland on an equal standing with Polish nationals in Poland's declaration with respect to Article 6, paragraph 1(a) of the Convention to be compatible with the object and purpose of the Convention only with the proviso that it does not exclude extradition of such persons to a State other than that in respect of which asylum has been granted".[487]

293. A number of Western States had a comparable reaction to the declaration made by Egypt upon ratification of the 1997 International Convention for the Suppression of Terrorist Bombings.[488] Considering that the declaration by the Arab Republic of Egypt "aims ... to extend the scope of the Convention" — which excludes assigning the status of "reservation" — the German Government declared that [it]:

> "is of the opinion that the Government of the Arab Republic of Egypt is only entitled to make such a declaration unilaterally for its own armed forces, and it interprets the declaration as having binding effect only on armed forces of the Arab Republic of Egypt. In the view of the Government of the Federal Republic of Germany, such a unilateral declaration cannot apply to the armed forces of other States Parties without their express consent. The Government of the Federal Republic of Germany therefore declares that it does not consent to the Egyptian declaration as so interpreted with regard to any armed forces other than those of the Arab Republic of Egypt, and in particular does not recognize any applicability of the Convention to the armed forces of the Federal Republic of Germany".[489]

294. In the context of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, a declaration by Canada concerning Arctic waters also triggered conditional reactions. France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and the United Kingdom of Great Britain and Northern Ireland declared that they:

> "take [ ] note of this declaration by Canada and consider [ ] that it should be read in conformity with Articles 57, 234 and 236 of the United Nations

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[486] Declaration of 15 June 1993: "The Republic of Poland declares, in accordance with paragraph 1(a) of Article 6, that it will under no circumstances extradite its own nationals.

The Republic of Poland declares that, for the purposes of this Convention, in accordance with paragraph 1(b) of Article 6, persons granted asylum in Poland will be treated as Polish nationals" (*European Treaty Series*, No. 024 (http://conventions.coe.int)).

[487] See also the identical reaction of Austria to the interpretative declaration of Romania (ibid.).

[488] The Egyptian "reservation" is formulated as follows: "The Government of the Arab Republic of Egypt declares that it shall be bound by article 19, paragraph 2, of the Convention to the extent that the armed forces of a State, in the exercise of their duties, do not violate the norms and principles of international law" (*Multilateral treaties* ..., note 473 above, p. 135 (chap. XVIII.9)).

[489] Ibid., p. 140. See also comparable declarations by the United States of America (ibid., p. 142), the Netherlands (ibid., pp. 142-143), the United Kingdom of Great Britain and Northern Ireland (ibid., pp. 145-146) and Canada (ibid., p. 150 (note 6)).

> Convention on the Law of the Sea. In particular, the ... Government recalls that Article 234 of that Convention applies within the limits of the exclusive economic zone or of a similar zone delimited in conformity with Article 57 of the Convention and that the laws and regulations contemplated in Article 234 shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence".[490]

295. The Czech declaration made further to Germany's interpretative declaration[491] in respect of part X of the Montego Bay Convention should be viewed from a slightly different perspective in that it is difficult to determine whether it is opposing the interpretation upheld by Germany or reclassifying the declaration as a reservation:

> "The Government of the Czech Republic having considered the declaration of the Federal Republic of Germany of 14 October 1994 pertaining to the interpretation of the provisions of Part X of the [said Convention], which deals with the right of access of land-locked States to and from the sea and freedom of transit, states that the [said] declaration of the Federal Republic of Germany cannot be interpreted with regard to the Czech Republic in contradiction with the provisions of Part X of the Convention".[492]

296. Such "conditional acceptances" do not constitute "approvals" within the meaning of draft guideline 2.9.1 and should be regarded as negative reactions. In fact, the authors of such declarations are not approving the proposed interpretation but rather are putting forward another which, in their view, is the only one in conformity with the treaty.

297. All these examples show that a negative reaction to an interpretative declaration can take varying forms: it can be a refusal, purely and simply, of the interpretation formulated in the declaration, a counter-proposal of an interpretation of the contested provision(s), or an attempt to limit the scope of the initial declaration, which was, in turn, interpreted. In any case, reacting States or international organizations are seeking to prevent or limit the scope of the interpretative declaration or its legal effect on the treaty, its application or its interpretation. In this connection, a negative reaction is therefore comparable, to some extent, to an objection to a reservation without, however, producing the same effect. Thus, a State or an international organization cannot oppose the entry into force of a treaty between itself and the author of the interpretative declaration on the pretext that it disagrees with the interpretation contained in the declaration. The author views its negative reaction as a safeguard measure, a protest against

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[490] For the text of the Canadian declaration, see *Status of Multilateral Conventions and Instruments* ..., note 476 above, p. 106.

[491] The relevant part of the German declaration reads as follows: "As to the regulation of the freedom of transit enjoyed by landlocked States, transit through the territory of transit States must not interfere with the sovereignty of these States. In accordance with article 125, paragraph 3, the rights and facilities provided for in Part X in no way infringe upon the sovereignty and legitimate interests of transit States. The precise content of the freedom of transit has in each single case to be agreed upon by the transit State and the landlocked State concerned. In the absence of such agreement concerning the terms and modalities for exercising the right of access of persons and goods to transit through the territory of the Federal Republic of Germany is only regulated by national law, in particular, with regard to means and ways of transport and the use of traffic infrastructure" (*Multilateral treaties* ..., note 473 above, p. 348 (chap. XXI.6)).

[492] See *Multilateral treaties* ..., note 473 above, p. 371 (note 13) (chap. XXI.6).

establishing an interpretation of the treaty that it might consider opposable, which it does not find appropriate,[493] and about which it must speak out.

298. That is why "opposition"[494] might be an apt term for negative reactions to an interpretative declaration, rather than "objection", even though this word has sometimes been used in practice.[495] Based on the model adopted for the definition of objections,[496] draft guideline 2.9.2 could define such opposition to an interpretative declaration as the intention of, and effect anticipated by, its author, as follows:

2.9.2 Opposition to an interpretative declaration

"Opposition" to an interpretative declaration means a unilateral statement made by a State or an international organization in response to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation proposed in the interpretative declaration or proposes an interpretation other than that contained in the declaration with a view to excluding or limiting its effect.

3. Reclassification

299. As illustrated in the third report on reservations to treaties, naming or phrasing of a unilateral statement by its author as a "reservation" or an "interpretative declaration" is not relevant for the purposes of classifying such a unilateral statement,[497] even if it provides a significant clue as to its nature.[498] This is conveyed by the phrase "however phrased or named" in draft guideline 1.1 (article 2, paragraph 1(d), of the Vienna Conventions) and draft guideline 1.2 of the Guide to Practice.

300. What frequently occurs in practice is that interested States do not hesitate to react to unilateral statements which their authors call interpretative, and to expressly

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[493] In this connection, see Lord McNair, *The Law of Treaties*, Oxford University Press, 1961, pp. 430-431.

[494] In the *Dictionnaire de droit international public*, the term "protestation" is defined as follows: "Act by which one or more subjects of international law express their intention not to recognize the validity or opposability of acts, conduct or claims issuing from third parties" (note 477 above, p. 907).

[495] See, for example, Italy's reaction to the interpretative declarations of Colombia, Ecuador, Mexico, Uruguay and Venezuela to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (see note 484 above). The reaction of Canada to the interpretative declaration of Germany to the Geneva Convention on the Continental Shelf (see note 480 above) was also registered in the "objection" category by the Secretary-General.

[496] See draft guideline 2.6.1 and its commentary, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. X, sect. 2.C, pp. 185-202.

[497] A/CN.4/491/Add.4, para. 282. See also draft guidelines 1.1 (Definition of reservations) and 1.2 (Definition of interpretative declarations).

[498] In this connection, draft guideline 1.3.2 (Phrasing and name) provides that: "The phrasing or name given to a unilateral declaration is an indication of the purported legal effect. This is the case in particular when a State or international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations". For commentary on this provision, see *Yearbook ... 1999*, vol. II, part two, pp. 109-111.

consider them as reservations.[499] These reactions, which might be called "reclassifications" to reflect their purpose, in no way resemble approval or opposition, since, of course, they do not refer to the actual content of the unilateral statement in question but rather to its form and to the applicable legal regime.

301. There are numerous examples of this phenomenon:

(a) The reaction of the Netherlands to Algeria's interpretative declaration in respect of article 13, paragraphs 3 and 4, of the 1966 International Covenant on Economic, Social and Cultural Rights:

> "In the opinion of the Government of the Kingdom of the Netherlands, the interpretative declaration concerning article 13, paragraphs 3 and 4 of the International Covenant on Economic, Social and Cultural Rights must be regarded as a reservation to the Covenant. From the text and history of the Covenant, it follows that the reservation with respect to article 13, paragraphs 3 and 4, made by the Government of Algeria is incompatible with the object and purpose of the Covenant. The Government of the Kingdom of the Netherlands therefore considers the reservation unacceptable and formally raises an objection to it";[500]

(b) The reactions of many States to the declaration made by Pakistan with respect to the same Covenant of 1966, which, after lengthy statements of reasons, conclude:

> "The Government of ... therefore regards the above-mentioned declarations as reservations and as incompatible with the object and purpose of the Covenant.
>
> The Government of ... therefore objects to the above-mentioned reservations made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and the Islamic Republic of Pakistan".[501]

(c) The reactions of many States to the declaration made by the Philippines with respect to the 1982 Montego Bay Convention:

> "The ... considers that the statement which was made by the Government of the Philippines upon signing the United Nations Convention on the Law of the Sea and confirmed subsequently upon ratification of that Convention in essence contains reservations and exceptions to the said Convention, contrary to the provisions of article 309 thereof".[502]

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499 Nor do the tribunals and treaty monitoring bodies hesitate to requalify an interpretative declaration as a reservation (see paras. (5) to (7) of the commentary on draft article 1.3.2, *Yearbook ... 1999*, vol. II, part two, pp. 109-111. This, however, does not touch on the *formulation* of these reactions; it is therefore not useful to revisit it here.

500 *Multilateral ...aties* ..., note 473 above, vol. I, pp. 170-171 (chap. IV.3). See also the objection of Portugal (ibid.) and the objection of the Netherlands to the declaration of Kuwait (ibid.).

501 Ibid., p. 170. See also the objections registered by Denmark (ibid., p. 167), Spain (ibid., p. 172), Finland (ibid., pp. 167-168), France (ibid., p. 168), Latvia (ibid., p. 170), Norway (ibid., p. 171), Netherlands (ibid., p. 170), United Kingdom of Great Britain and Northern Ireland (ibid., p. 174) and Sweden (ibid., pp. 172-173).

502 Ibid., vol. II, p. 363 (chap. XXI.6); see also the reactions similar in letter or in spirit from Australia, Bulgaria, Russian Federation and Ukraine (ibid., pp. 363-365).

(d) The reclassification formulated by Mexico, which considered that:

> "... the third declaration [formally classified as interpretative] submitted by the Government of the United States of America (...) constitutes a unilateral claim to justification, not envisaged in the Convention [the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances], for denying legal assistance to a State that requests it, which runs counter to the purposes of the Convention".[503]

(e) The reaction of Germany to a declaration whereby the Government of Tunisia indicated that it would not, in implementing the Convention on the Rights of the Child of 20 November 1989, "adopt any legislative or statutory decision that conflicts with the Tunisian Constitution":

> "The Federal Republic of Germany considers the first of the declarations deposited by the Republic of Tunisia to be a reservation. It restricts the application of the first sentence [sic] of article 4 ...".[504]

(f) The reactions of 19 States to the declaration made by Pakistan with respect to the 1997 International Convention for the Suppression of Terrorist Bombings, whereby Pakistan specified that "nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination":

> "The Government of Austria considers that the declaration made by the Government of the Islamic Republic of Pakistan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its objective and purpose ...".[505]

(g) The reactions of Germany and the Netherlands to the declaration made by Malaysia upon accession to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, whereby Malaysia made the implementation of article 7 of the Convention subject to its domestic legislation:

> "The Government of the Federal Republic of Germany considers that in making the interpretation and application of Article 7 of the Convention subject to the national legislation of Malaysia, the Government of Malaysia introduces a general and indefinite reservation that makes it impossible to clearly identify in which way the Government of Malaysia intends to change the obligations arising from the Convention. Therefore the Government of the Federal Republic of Germany hereby objects to this declaration which is considered to be a reservation that is incompatible with the object and purpose of the Convention. This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and Malaysia".[506]

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503 Ibid., vol. I, p. 483 (chap. VI.19).

504 Ibid., p. 340 (chap. IV.11).

505 Ibid., vol. II, p. 138 (chap. XVIII.9). See the reactions similar in letter or in spirit from Germany, Australia, Canada, Denmark, Finland, France, Spain, United States, India, Israel, Italy, Japan, Norway, New Zealand, Netherlands, United Kingdom and Sweden (ibid., pp. 138-146). See also the reactions of Germany and the Netherlands to the unilateral declaration made by Malaysia (ibid., pp. 140 and 143).

506 Ibid., p. 124 (chap. XVIII.7).

(h) The reaction of Sweden to the declaration by Bangladesh indicating that article 3 of the 1953 Convention on the Political Rights of Women could only be implemented in accordance with the Constitution of Bangladesh:

> "In this context the Government of Sweden would like to recall, that under well-established international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Thus, the Government of Sweden considers that the declarations made by the Government of Bangladesh, in the absence of further clarification, in substance constitute reservations to the Convention.
>
> The Government of Sweden notes that the declaration relating to article III is of a general kind, stating that Bangladesh will apply the said article in consonance with the relevant provisions of its Constitution. The Government of Sweden is of the view that this declaration raises doubts as to the commitment of Bangladesh to the object and purpose of the Convention and would recall that, according to well-established international law, a reservation incompatible with the object and purpose of a treaty shall not be permitted".[507]

302. These examples show that reclassification consists of considering that a unilateral statement submitted as an "interpretative declaration" is in reality a "reservation", with all the legal effects that this entails. Thus, reclassification seeks to change the legal status of the unilateral statement in the relationship between the State or organization having submitted the statement and the "reclassifying" State or organization. As a general rule, such declarations, which are usually extensively reasoned,[508] are based essentially on the criteria for distinguishing between reservations and interpretative declarations.[509]

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[507] Ibid., p. 86 (chap. XVI.1). See also the identical declaration of Norway (ibid.).

[508] For a particularly striking example, see the reactions to Pakistan's interpretative declaration in relation to the International Covenant on Economic, Social and Cultural Rights (para. 301 (b) above and note 501 above).

[509] See draft guidelines 1.3 to 1.3.3:

1.3 Distinction between reservations and interpretative declarations

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

1.3.2 Phrasing and name

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 Formulation of a unilateral statement when a reservation is prohibited

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

303. Draft guideline 2.9.3 is based on this State practice and defines "reclassification" accordingly:

2.9.3 Reclassification of an interpretative declaration

"Reclassification" means a unilateral statement made by a State or an international organization in response to a declaration in respect of a treaty formulated by another State or another international organization as an interpretative declaration, whereby the former State or organization purports to regard the declaration as a reservation and to treat it as such.

[In formulating a reclassification, States and international organizations shall [take into account] [apply] draft guidelines 1.3 to 1.3.3.]

304. The examples cited show that, in practice, States almost always combine the reclassification with an objection to the reservation. It should be borne in mind, however, that reclassifying an interpretative declaration as a reservation is one thing and objecting to the reservation thus "reclassified" is another. Nonetheless, it should be noted that even in the case of a reservation that is "disguised" (as an interpretative declaration) — which, from a legal standpoint, has always been a reservation — the rules of procedure and formulation as set out in the present Guide to Practice remain fully applicable. This clearly means that a State wishing to formulate a reclassification *and* an objection must abide by the procedural rules and time periods applicable to reclassification[510] *and* objection,[511] and that, in principle, the time period for formulating such a "combined statement" is accordingly shortened to the one provided for in article 20, paragraph 5, of the Vienna Conventions and in draft guideline 2.6.13.[512] An objection submitted after that time period cannot produce all of its legal effects and the reclassified reservation must be regarded as having been accepted.[513]

305. This is why it is specified, at the end of the first paragraph of draft guideline 2.9.3, that the author State or organization must accordingly treat the reclassified reservation as such.

306. The second paragraph, while following the usual practice, provides a logical corollary to the rules already adopted by the Commission with respect to the distinction between reservations and interpretative declarations. It seems desirable to place this provision here, for reasons more of convenience than of strict logic, as this stipulation concerns the substantive rules for making the distinction rather than the rules governing formulation as such. This is why the provision is in square brackets.

4. Silence

307. The practice surveyed above reveals that States make considerable use of silence in relation to interpretative declarations. Express positive and even express negative reactions are extremely rare. It should therefore be asked whether this pervasive silence can be taken to signify consent to the interpretation proposed by

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[510] See paras. 317-323 below.

[511] See the eleventh report on reservations to treaties (A/CN.4/574), paras. 87-114.

[512] Ibid., para. 128, draft guideline 2.6.13.

[513] Ibid., para. 143, draft guideline 2.6.15.

the State or the international organization that formulated the interpretative declaration.

308. In the case of reservations, silence, according to the presumption provided for in article 20, paragraph 5, of the Vienna Conventions, means consent. The International Court of Justice, in its 1951 advisory opinion, noted the "very great allowance made for tacit assent to reservations",[514] and the work of the International Law Commission has from the outset acknowledged the considerable part played by tacit acceptance.[515] Sir Humphrey Waldock justified the principle of tacit acceptance by pointing out that:

> "[i]t is (...) true that, under the 'flexible' system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State".[516]

309. In the case of simple interpretative declarations (as opposed to conditional declarations), these concerns do not arise. By definition, an interpretative declaration purports only to "specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions", and in no way imposes conditions on its author's consent to be bound by the treaty.[517] Whether or not other States or international organizations consent to the interpretation put forward in the declaration has no effect on the author's legal status with respect to the treaty; the author becomes or remains a contracting party regardless. Continued silence on the part of the other parties has no effect on the status as a party of the State or organization that formulates an interpretative declaration: such silence cannot prevent the latter from becoming or remaining a party, in contrast to what could occur in the case of reservations under article 20, paragraph 4 (c), of the Vienna Conventions were it not for the presumption provided for in paragraph 5 of that article.

310. Thus, since it is not possible to proceed by analogy with reservations, the issue of whether, in the absence of an express reaction, there is a presumption of approval of or opposition to interpretative declarations remains unresolved. In truth, however, this question can only be answered in the negative. It is indeed inconceivable that silence, in itself, could produce such a legal effect. The following comment by Gionata Buzzini in a study on silence in response to a violation of a rule of international law is fully applicable here: "*le silence en tant que tel ne dit rien*

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[514] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory opinion, I.C.J. Reports 1951*, p. 21.

[515] See D. Müller, commentary on article 20 (1969), in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, Brussels, Bruylant, 2006, pp. 814-815, paras. 31 and 32.

[516] First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 67, para. 15.

[517] The situation is evidently different with respect to conditional interpretative declarations. See paras. 324-330 below.

puisqu'il est capable de 'dire' trop de choses à la fois" (silence in itself says nothing because it is capable of 'saying' too many things at once).[518]

311. Silence can express either agreement or disagreement with the proposed interpretation. States may consider it unnecessary to respond to an interpretative declaration because it accurately reflects their own position, or they may feel that the interpretation is erroneous but that there is no point in proclaiming as much because, in any event, the interpretation would not, in their view, be upheld by an impartial third party in case of a dispute. It is impossible to decide which of these two hypotheses is correct.

312. Moreover, this appears to be the position most widely supported in the literature. Franck Horn states that:

> "Interpretative declarations must be treated as unilaterally advanced interpretations and should therefore be governed only by the principles of interpretation. The general rule is that a unilateral interpretation cannot be opposed to any other party in the treaty. Inaction on behalf of the confronted states does not result in automatic construction of acceptance. It will only be one of many cumulative factors which together may evidence acquiescence. The institution of estoppel may become relevant, though this requires more explicit proof of the readiness of the confronted states to accept the interpretation".[519]

313. Thus, although silence cannot in itself be construed as either approval or opposition — neither of which can by any means be presumed — the position taken by F. Horn indicates that silence can, under certain conditions, be taken to signify acquiescence in accordance with the principles of good faith and, more particularly in the context of interpreting treaties, through the operation of article 31, paragraph 3 (b), of the Vienna Conventions, which provides for the consideration, in interpreting a treaty, of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Further, the concept of acquiescence itself is not unknown in treaty law: article 45 of the 1969 Vienna Convention provides that:

> "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:
>
> *(a)* ...
>
> *(b)* it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be".

Article 45 of the 1986 Vienna Convention reproduces this provision, adapting it to the specific case of international organizations.

314. But this provision does not define the "conduct" in question and it seems extremely difficult, if not impossible, to determine in advance the circumstances in

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[518] "Abstention, silence et droit international général", *Rivista di Diritto internazionale*, 2005/2, p. 382.

[519] F. Horn, note 472 above, p. 244 (footnotes omitted); see also D. M. McRae, note 472 above, p. 168.

which a State or an organization is bound to protest expressly in order to avoid being considered as having acquiesced to an interpretative declaration or to a practice that has been established on the basis of such a declaration.[520] In other words, it is particularly difficult to determine when and in what specific circumstances silence is tantamount to consent.[521] As the Eritrea-Ethiopia Boundary Commission underscored:

> "The nature and extent of the conduct effective to produce a variation of the treaty is, of course, a matter of appreciation by the tribunal in each case. The decision of the International Court of Justice in the *Temple* case is generally pertinent in this connection. There, after identifying conduct by one party which it was reasonable to expect that the other party would expressly have rejected if it had disagreed with it, the Court concluded that the latter was stopped or precluded from challenging the validity and effect of the conduct of the first. This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement. But in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule — whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first".[522]

315. It therefore seems impossible to provide, in the abstract, clear guidelines for determining when a silent State has, by its silence, created an effect of acquiescence or estoppel. This can only be determined on a case-by-case basis in the light of the circumstances in question.

316. Draft guidelines 2.9.8 and 2.9.9 reflect the principles inferred from State practice. The former unequivocally states that the presumption provided for in article 20, paragraph 5, of the Vienna Conventions is not applicable with respect to silence on the part of a State or an international organization in response to an interpretative declaration and that silence cannot in itself be construed as either approval or opposition. The latter points out to users of the Guide to Practice that, although silence is not in principle equivalent to approval of or acquiescence to an interpretative declaration, in some circumstances the silent State may be considered

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[520] See, among others, Ch. Rousseau, *Droit international public*, vol. I: *Introduction et sources*, Paris, Sirey, 1970, p. 430, No. 347.

[521] In this connection, Heinrich Drost, "*Grundfragen der Lehre vom internationalen Rechtsgeschäft*", in D. S. Constantopoulos and Hans Wehberg (eds.), *Gegenwartsprobleme des internationalen Rechts und der Rechtsphilosophie, Festschrift für Rudolf Laun zu seinem siebzigsten Geburtstag*, Hamburg, Girardet, 1953, p. 218: "Wann Schweigen als eine Anerkennung angesehen werden kann, ist Tatfrage. Diese ist nur dann zu bejahen, wenn nach der Sachlage — etwa nach vorhergegangener Notifikation — Schweigen nicht nur als ein objektiver Umstand, sondern als schlüssiger Ausdruck des dahinterstehenden Willens aufgefaßt werden kann" (The question as to when silence can be construed as acceptance is a question of circumstances. The answer cannot be affirmative unless, given the factual circumstances — following prior notification, for example — silence cannot be understood simply as an objective situation, but as a conclusive expression of the underlying will).

[522] Decision regarding delimitation of the border between Eritrea and Ethiopia, 13 April 2002, Permanent Court of Arbitration, *Reports of International Arbitral Awards*, vol. XXV, p. 111, para. 3.9; see also the well-known separate opinion of Judge Alfaro in the *Temple of Preah Vihear* case, *I.C.J. Reports 1962*, p. 40.

as having acquiesced to the declaration by reason of its conduct or lack of conduct in relation to the interpretative declaration.

2.9.8 Non-presumption of approval or opposition

Neither approval of nor opposition to an interpretative declaration shall be presumed.

2.9.9 Silence in response to an interpretative declaration

Consent to an interpretative declaration shall not be inferred from the mere silence of a State or an international organization in response to an interpretative declaration formulated by another State or another international organization in respect of a treaty.

In certain specific circumstances, however, a State or an international organization may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be.

5. Rules applicable to the formulation of an approval, opposition or reclassification in respect of an interpretative declaration

317. While reactions to interpretative declarations differ considerably from acceptances of or objections to reservations, it seems appropriate to ensure, to the extent possible, that such reactions are publicized widely, on the understanding that States and international organizations have no legal obligation in this regard[523] but that any legal effects which they may expect to arise from such reactions will depend in large part on how widely they disseminate those reactions. Although the legal effects of such reactions (combined with those of the initial declaration) on the interpretation and application of the treaty in question will not be discussed at this stage, it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their raison d'être and the purpose for which they are formulated by States and international organizations. The International Court of Justice has highlighted the importance of these statements in practice:

> "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument".[524]

318. In a study on unilateral statements, Rosario Sapienza also underlined the importance of reactions to interpretative declarations, which:

> "contribute usefully to the settlement [of a dispute]. Statements will be still more useful to the interpreter when there is no dispute, but only a problem of interpretation".[525]

319. Notwithstanding the undeniable usefulness of reactions to interpretative declarations not only for the interpreter or judge but also for enabling the other States and international organizations concerned to determine their own position

[523] See note 526 below.

[524] Advisory opinion of 11 July 1950, *International status of South-West Africa, I.C.J. Reports 1950*, pp. 135-136.

[525] See note 472 above.

with respect to the declaration, the Vienna Convention does not require that such reactions be communicated. As has already been indicated in the study on the form and communication of interpretative declarations themselves:

> "There seems to be no reason to transpose the rules governing the communication of reservations to simple interpretative declarations, which may be formulated orally; it would therefore be paradoxical to insist that they be formally communicated to other interested States or international organizations. By refraining from such communication, the author of the declaration runs the risk that the declaration may not have the intended effect, but this is a different problem altogether. It does not seem necessary, therefore, to include a clarification of this point in the Guide to Practice".[526]

320. There is no reason to take a different approach with respect to reactions to such interpretative declarations and it would be inappropriate to impose more stringent formal requirements on them than on the interpretative declarations to which they respond. The same caveat applies, however: if States or international organizations do not adequately publicize their reactions to an interpretative declaration, they run the risk that the intended effects may not be produced. If the authors of such reactions want their position to be taken into account in the treaty's application, particularly when there is a dispute, it would probably be in their interest to:

(a) Formulate the reaction in writing to meet the requirements of legal security and to ensure notification of the reaction;

(b) State the reasons for the reaction; as shown by the practice described above,[527] States generally take care to explain, sometimes in great detail, the reasons for their approval, protest or reclassification. These reasons are useful not only for the interpreter: they can also alert the State or the international organization that submitted the interpretative declaration to the points found to be problematic in the declaration and, potentially, induce the author to revise or withdraw the declaration. This constitutes, with respect to interpretative declarations, the equivalent of the "reservations dialogue";

(c) Follow, in making such statements, the same communication and notification procedure applicable to the communication and notification of other declarations in respect of the treaty (reservations, objections or acceptances).

321. Although the Special Rapporteur is convinced of the soundness of these recommendations, he is hesitant to propose a draft guideline reflecting them because the Commission has not adopted equivalent guidelines with respect to interpretative declarations themselves. If, however, the Commission considers that it would be useful to include a draft guideline to this effect in the Guide to Practice, such a guideline could consist only of recommendations modelled on those adopted, for example, with respect to statements of reasons for reservations[528] and objections to reservations.[529] Such a provision, if included, could draw upon those concerning the procedure for other types of declarations in respect of a treaty — which is, in fact, quite uniform — as contained in draft guidelines 2.1.1 to 2.1.7 on reservations, 2.4.1

[526] Sixth report on reservations to treaties (A/CN.4/518/Add.1), para. 130.

[527] See paras. 288-295 and 301 above.

[528] See A/CN.4/586.

[529] See the eleventh report on reservations to treaties (A/CN.4/574), paras. 110-111.

and 2.4.7 on interpretative declarations, 2.6.7, 2.6.9 and 2.6.10 on objections to reservations and 2.8.3 to 2.8.5 on express acceptance of reservations:[530]

2.9.5 Written form of approval, opposition and reclassification

An approval, opposition or reclassification in respect of an interpretative declaration shall be formulated in writing.

2.9.6 Statement of reasons for approval, opposition and reclassification

Whenever possible, an approval, opposition or reclassification in respect of an interpretative declaration should indicate the reasons why it is being made.

2.9.7 Formulation and communication of an approval, opposition or reclassification

An approval, opposition or reclassification in respect of an interpretative declaration should, mutatis mutandis, be formulated and communicated in accordance with draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.

322. With respect to time frames, reactions to interpretative declarations may in principle be formulated at any time. Interpretation occurs throughout the life of the treaty and there does not seem to be any reason why reactions to interpretative declarations should be confined to any specific time frame, when the declarations themselves are not, as a general rule (and in the absence of a provision to the contrary in the treaty), subject to any particular time frame.[531]

323. Moreover, and on this score reactions to interpretative declarations resemble acceptances of and objections to reservations, both contracting States and contracting international organizations and States and international organizations that are entitled to become parties to the treaty should be able to formulate an express reaction to an interpretative declaration at least from the time they become aware of it, on the understanding that the author of the declaration is responsible for disseminating it (or not)[532] and the reactions of non-contracting States or non-contracting international organizations will not necessarily produce the same legal effect as those formulated by contracting parties (and probably no effect at all, for as long as the author State or international organization has not expressed consent to be bound). It is thus perfectly logical that the Secretary-General should have accepted Ethiopia's opposition to the interpretative declaration formulated by the Arab Republic of Yemen with respect to the Montego Bay Convention even though Ethiopia has not ratified the Convention.[533]

2.9.4 Freedom to formulate an approval, protest or reclassification

An approval, opposition or reclassification in respect of an interpretative declaration may be formulated at any time by any contracting State or any

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[530] In the last two cases, the draft guidelines mentioned are numbered as shown in the eleventh and twelfth reports on reservations (see A/CN.4/574, paras. 87-98 and 105-111, and A/CN.4/584, paras. 225-236); this numbering may be changed by the Drafting Committee.

[531] See the commentary on draft guideline 1.2, *Yearbook ... 1999*, vol. II, part two, pp. 101-103, paras. 21-32.

[532] See note 526 above.

[533] See *Multilateral treaties ...*, note 473 above, vol. II, p. 364 (chap. XXI.6).

contracting international organization and by any State or any international organization that is entitled to become a party to the treaty.

B. Conditional interpretative declarations

324. Conditional interpretative declarations differ from "simple" interpretative declarations in their potential effect on the treaty's entry into force. The key feature of conditional interpretative declarations is that the author makes its consent to be bound by the treaty subject to the proposed interpretation. If this condition is not met, i.e. if the other States and international organizations parties to the treaty do not consent to this interpretation, the author of the interpretative declaration is considered not to be bound by the treaty, at least with regard to the parties to the treaty that contest the declaration. The declaration made by France upon signing[534] Additional Protocol II to the Tlatelolco Treaty for the Prohibition of Nuclear Weapons in Latin America provides a particularly clear example of this:[535]

> "In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States".

325. As recalled earlier,[536] this feature brings conditional interpretative declarations infinitely closer to reservations than "simple" interpretative declarations. The commentary on draft guideline 1.2.1 (Conditional interpretative declarations) states, in this connection:

> "Consequently, it seems highly probable that the legal regime of conditional interpretative declarations would be infinitely closer to that of reservations, *especially with regard to the anticipated reactions of the other contracting parties to the treaty*, than would the rules applicable to simple interpretative declarations".[537]

326. Given the conditionality of such an interpretative declaration, the regime governing reactions to it must be more orderly and definite than the one applicable to "simple" interpretative declarations. There is a need to know with certainty and within a reasonable time period the position of the other States parties concerning the proposed interpretation so that the State or organization that submitted the conditional interpretative declaration will be able to take a decision on its legal status with respect to the treaty — is it or is it not a party to the treaty? These questions arise in the same conditions as those pertaining to reservations to treaties, the reactions to which (acceptance and objection) are governed by a very formal, rigid legal regime aimed principally at determining, as soon as possible, the legal status of the reserving State or organization. This aim is reflected not only by the relative formality of the rules, but also by the establishment of a presumption of acceptance after a certain period of time has elapsed in which another State or

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[534] The declaration was confirmed upon ratification, on 22 March 1974; see United Nations, *Treaty Series*, vol. 936, p. 419.

[535] See also *Yearbook ... 1999*, vol. II, part two, p. 103, para. 3 of the commentary on draft guideline 1.2.1.

[536] See para. 280 above.

[537] See para. 14 of the commentary (italics added).

another international organization has not expressed disagreement with — i.e., objection to — the reservation.[538]

327. Thus, the procedure for reactions to conditional interpretative declarations should follow the same rules as those applicable to acceptance of and objection to reservations, including the rule on the presumption of acceptance. There may be doubts, however, about the 12-month time period set out in article 20, paragraph 5, of the Vienna Conventions, which, as explained earlier, is probably not reflective of customary international law. Nonetheless, the reasons that led Sir Humphrey to propose this solution seem valid and transposable mutatis mutandis to the case of conditional interpretative declarations. As he explained:

> "But there are, it is thought, good reasons for proposing the adoption of the longer period [of 12 months]. First, it is one thing to agree upon a short period [of three or six months] for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed".[539]

328. A problem of terminology arises, however. The relative parallelism noted up to this point between conditional interpretative declarations and reservations implies that reactions to such declarations could borrow the same vocabulary and be termed "acceptances" and "objections". However, the definition of objections to reservations does not seem to be at all suited to the case of a reaction expressing the disagreement of a State or an international organization with a conditional interpretative declaration made by another State or another international organization. Draft guideline 2.6.1 lays down a definition of objections to reservations that is based essentially on the effect intended by their author: according to this definition, an objection means a unilateral statement "whereby the (...) State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization".[540]

329. It is certainly difficult to state categorically, at the current stage of the work on the Guide to Practice and in the absence of a decision by the Commission on the legal effects of a conditional interpretative declaration on a treaty, whether an "objection" to such a declaration falls under this definition. However, there may be serious doubts about the wisdom of using the same terminology to denote both negative reactions to conditional interpretative declarations and objections to reservations. By definition, such a reaction can neither modify nor exclude the legal effect of the conditional interpretative declaration as such (regardless of what that legal effect may be); all it can do is to exclude the State or international organization from the circle of parties to the treaty. Refusal to accept the *conditional*

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[538] See draft guideline 2.4.8, Late formulation of a conditional interpretative declaration: "A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration."

[539] See the first report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 67, para. 16.

[540] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. X, sect. C.2 (2.6.1), p. 186.

interpretation proposed creates a situation in which the condition for consent to be bound is absent. What is more, it is not the author of the negative reaction, but the author of the conditional interpretative declaration, that has the responsibility to take the action that follows from the refusal.

330. The Special Rapporteur therefore considers that, for the moment, it is best to leave the terminology issue in abeyance until the Commission has taken a final decision on the effects of conditional interpretative declarations and on their possible assimilation to reservations.

2.9.10 Reactions to conditional interpretative declarations

Guidelines 2.6 to 2.8.12 shall apply, mutatis mutandis, to reactions of States and international organizations to conditional interpretative declarations.